

IDAHO DEPARTMENT OF FISH AND GAME

IBLA 87-772

Decided November 22, 1989

Appeal from a decision of the Idaho State Office, Bureau of Land Management, denying protest of public land sale. I-23363 and I-20355.

Appeal dismissed.

1. Public Sales: Generally--Rules of Practice: Appeals: Standing to Appeal

A challenge to the suitability of land for public sale under 43 U.S.C. | 1713 (1982) is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2. An appeal of the decision to sell a tract of land, as distinguished from an appeal of the method of sale or the procedures used in conducting the sale, is properly dismissed by the Board for lack of jurisdiction.

APPEARANCES: Tracy T. Trent, Idaho Department of Fish and Game.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Idaho Department of Fish and Game (Fish and Game) appeals from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated July 22, 1987, denying its protest of a proposed sale of two parcels of land in Bingham County, Idaho, I-23363 and I-20355.

On April 30, 1987, BLM published a notice in the Federal Register offering several parcels of land, including I-20355 and I-23363, for sale by competitive bidding. Parcel I-20355, consisting of 40 acres, is located in sec. 27, T. 4 S., R. 31 E., Boise Meridian, Idaho. Parcel I-23363, encompassing 80 acres, is situated in sec. 31, T. 4 S., R. 31 E., Boise Meridian, Idaho. See 52 FR 15774 (Apr. 30, 1987). Statutory authority for the sale is found in section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1713 (1982). The notice stated that interested parties could submit comments to the District Manager, BLM, Idaho Falls, Idaho, for a period of 45 days from the date of publication.

By letter dated June 1, 1987, Fish and Game protested BLM's disposal of the two parcels in issue. Fish and Game set forth the following objections regarding the parcels:

I-20355 - This 40 acre parcel is currently the only block of winter cover for pheasants and upland birds in this area. It is critical pheasant habitat. There is potential for enhancement of this to improve its value for pheasant habitat.

I-23363 - This 80 acre parcel is also ideally located to provide permanent winter cover for pheasants. Potential also exists to improve habitat on this parcel.

Fish and Game proposed that these tracts, along with other isolated tracts in the area, be included in an isolated tracts habitat management project under a cooperative management agreement. Fish and Game explained that it has become involved in a more intensive pheasant habitat improvement program through the Conservation Reserve Program (CRP). According to Fish and Game, CRP involves taking highly erodible lands out of production and putting them in permanent cover for 10 years. Fish and Game asserts that it is presently cooperating on programs to plant "pheasant winter cover" on some of the acreage. Appellant also contends that proceeds from the sale of the pheasant stamp recently authorized by the Idaho legislature will be designated for the support of habitat improvement projects. Fish and Game sees "Isolated Tracts" projects as a significant part of the habitat program.

By letter decision dated July 22, 1987, BLM denied Fish and Games' protest by stating that the notice of realty action would stand as published, but with sales dates rescheduled for parcels I-20355 and I-23363. BLM stated that review of the public land status records does not substantiate the claim that I-20355 is the only block of winter cover in the area. BLM explained that this parcel corners with 930 acres of public land which adjoins an even larger block. Regarding parcel I-23363, BLM stated that although this parcel is surrounded by private lands, it is in the vicinity of larger blocks of public land lying one-half mile to the north and one-fourth mile to the east. BLM pointed out that the value of this tract is diminished by the absence of public access and that habitat enhancement would be more logical where access is available. BLM found that these two parcels did not have significantly higher pheasant and upland bird habitat potential than other public lands adjacent to or in close proximity to the sale tracts.

With respect to the legal basis for the action taken, the BLM decision stated that a 1987 field examination of the tracts disclosed unauthorized dumping and grazing on these two parcels. BLM explained that management of small isolated parcels is often difficult and inefficient and that under FLPMA, the Secretary of the Interior is authorized to sell such land. BLM stated that these two parcels meet the disposal criteria established by section 203(a)(1) of FLPMA, 43 U.S.C. | 1713(a)(1) (1982).

In its statement of reasons for appeal, Fish and Game asserts that both parcels have significantly higher pheasant and upland bird habitat potential than other public lands adjacent to or in close proximity to the sale tracts. According to Fish and Game, almost all public lands near these tracts have been burned and are wheatgrass or crested wheatgrass monocultures. Fish and Game proposes that these parcels could be developed as quality pheasant habitat at considerably lower cost than other public lands in the area.

Regarding parcel I-20355, Fish and Game asserts that removal of this block of winter cover would entirely destroy this area as pheasant habitat. Fish and Game explains that this parcel and a small area of adjoining private land are the only significant block of brush for at least 2 miles and that scientific literature has shown that a 2-mile radius is the distance a pheasant will travel in its seasonal movements. Also, Fish and Game notes that the adjacent 240 acres of public land have been classified as suitable for desert land entry and questions the long-term availability of that land.

Fish and Game contends that the proximity of irrigation water for food plots and the presence of good brush cover on this parcel distinguish it from the vast majority of BLM land in the area. Appellant adds that it has water rights in a canal which transects this parcel, thereby allowing irrigated food plots to be developed at a relatively low cost. Fish and Game further avers that a pivot sprinkler system currently approaches very close to this parcel. Appellant states that a cooperative agreement to provide a food plot on this parcel is possible.

Concerning parcel I-23363, Fish and Game states that this land also has good potential for food plots through cooperative farming agreements because of its proximity to irrigated farmland.

[1] In order to determine jurisdiction in this case, it is necessary to distinguish protests of the decision to sell from protests of the manner of sale. To the extent that someone challenges the suitability of land for disposal, the Board has held that the procedures set forth at 43 CFR 1610.5-2 (formerly codified at 43 CFR 1601.6-1 (1982)) are the exclusive appeal provisions. George Schultz, 94 IBLA 173 (1986); see Oregon Natural Resources Council, 78 IBLA 124, 127 (1983). The regulations governing sales of public lands pursuant to section 203 of FLPMA, 43 U.S.C. § 1713 (1982), provide that tracts shall only be offered for sale in implementation of land-use planning under the regulations at 43 CFR Subpart 1601. <sup>1/</sup> 43 CFR 2711.1-1. Thus, the notice of realty action published in the Federal Register recited that the "tracts have been examined and through the public-supported land use planning process have been determined to be suitable for disposal by sale." 52 FR 15774 (Apr. 30, 1987). The administrative review provisions with respect to BLM decisions under the regulations at 43 CFR Subpart 1610 preclude review of the decision by the Board of Land Appeals.

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<sup>1/</sup> The reference is to the former land-use planning regulations now codified at 43 CFR Part 1610.

See 43 CFR 1610.5-2. Accordingly, this Board has dismissed for lack of jurisdiction those appeals challenging the decision to offer a given tract of land for public sale. See George Schultz, *supra*; Oregon Natural Resources Council, *supra*.<sup>2/</sup> To the extent, however, that someone challenges the mode of disposal (*i.e.*, direct sale rather than competitive sale) or procedures under the sale, these matters are subject to Board review upon the filing of a notice of appeal by an individual who is adversely affected. George Schultz, *supra* at 127. See also Richard D. & Virginia Troon, 93 IBLA 256 (1986); Hazel Anna Smith, 82 IBLA 230 (1984).

A review of Fish and Games' statement of reasons discloses that it does not object to either the mode of disposal or the procedures under the sale. Rather, it questions whether the land is suitable for disposal. As noted above, appeals relating to that question are not subject to the Board's jurisdiction and must be pursued under 43 CFR 1610.5-2. The Federal Register notice of April 30, 1987, specified that the sale of the two parcels would be by competitive bidding. Fish and Game did not object to this form of bidding. Indeed, Fish and Game could have submitted a bid but did not do so. Nor did Fish and Game object to the procedures explained in the Federal Register. The main thrust of Fish and Game's appeal is that these parcels are best suited to pheasant habitat. Absent an allegation challenging the mode of disposal or the procedures under the sale and an allegation that Fish and Game has been adversely affected, the propriety of the sale is not within this Board's jurisdiction. Accordingly, Fish and Game's appeal is properly dismissed.

We note, however, that the record indicates the decision to sell is supported by statutory authority. Under section 203(a) of FLPMA, 43 U.S.C. | 1713(a) (1982), the Secretary or his delegated representative may decide to sell a tract of public land where the tract meets one of several "dis-posal criteria." One of the alternative criteria is where a tract "because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency." 43 U.S.C. | 1713(a)(1) (1982).

The record contains ample support for the conclusion of BLM that the tracts meet the disposal criteria. The appraisal reports for both parcels dated February 18, 1987, noted that the parcels had been used for dumping. It was the appraiser's opinion in both instances that the highest and best use of the land is for adding to an existing ranching operation.

In March 1987 BLM prepared an environmental assessment (EA) to determine if the parcels of public land should be sold pursuant to FLPMA. In analyzing the environmental consequences of the proposed action, BLM

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<sup>2/</sup> We recognize that BLM in its decision informed Fish and Game of a right to appeal to the Board, but such a statement is not dispositive of the right of appeal. In Oregon Natural Resources Council, *supra* at 127, the Board held that it is the arbiter of its jurisdiction and that neither employees of BLM nor attorneys in the Solicitor's office may create or deny the right to appeal to the Board.

acknowledged that the parcels provide cover for pheasants within an area that is primarily farmed and that disposal of the parcels could have an adverse effect on pheasant habitat (March 1987 EA at 4). However, the EA recommended sale of the parcels based on the fact that this action would reduce BLM's responsibility for managing small isolated parcels which are difficult and uneconomical to manage. BLM stated that "[t]he parcels are constantly a problem because of repeated grazing trespass (\* \* \* I-20355), [and] agricultural trespasses (which were settled) on \* \* \* I-23363. All of the parcels have dumping of trash, rocks or heavy equipment." Thus, the record supports a finding that these parcels meet the criteria for disposal as set forth in section 203(a) of FLPMA, 43 U.S.C. | 1713(a) (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge